



WASHINGTON NATIONAL OFFICE

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RE: Marriage Protection Act, H.R. 3313, Is Unconstitutional

Dear Representative:

The American Civil Liberties Union strongly urges you to oppose the Marriage Protection Act, H.R. 3313. Ironically, only a few hours before the Senate will overwhelmingly reject an amendment to the Constitution depriving states of the ability to extend marriage rights to gay and lesbian couples, the House Judiciary Committee is scheduled to vote on a bill that would violate the Constitution. The ACLU urges the Congress to reject these measures that either amend the Constitution or violate the Constitution.

The Marriage Protection Act would deny all federal courts--including the U.S. Supreme Court--of any jurisdiction to review the constitutionality of the cross-state recognition section¹ of the Defense of Marriage Act.² Like most other court-stripping legislation, the Marriage Protection Act alters the relationship between the judicial branch and the two other branches of the federal government. But the problems with the Marriage Protection Act are particularly extreme for two reasons:

- the Marriage Protection Act violates the Equal Protection Clause by punishing a specific minority group with completely cutting off access to one branch of the federal government for the judicial review of a statute affecting only that minority group;

¹ The cross-state recognition section of DOMA authorizes states to refuse to recognize marriages of same-sex couples performed in other states.

² Our understanding is that the Judiciary Committee will delete the bill's reference to the other section of DOMA, which defines "marriage" for purposes of federal benefits, before marking-up the bill. The inclusion of the federal benefits section of DOMA would have created even graver due process problems because state courts have no jurisdiction over claims against the United States, unless the United States voluntarily subjects itself to the jurisdiction of the state courts. It is the historical policy of the United States to refuse to subject itself to state court jurisdiction.

- the Marriage Protection Act takes the extraordinarily harmful step of denying even the U.S. Supreme Court of jurisdiction, thereby denying the Supreme Court its historical role as the final authority on resolving differing interpretations of federal statutes.

These problems go far beyond the concerns that the Congress has traditionally had with other bills that strip federal courts of their ability to review federal statutes.

A. The Marriage Protection Act Violates the Equal Protection Clause Because It Serves No Legitimate Governmental Purpose in Shutting the Federal Courthouse Doors to Gay and Lesbian Couples

In a recent decision, the Supreme Court invalidated a Colorado state constitutional amendment that barred any state or local government from enacting or enforcing any laws protecting against discrimination based on sexual orientation. Romer v. Evans, 134 L. Ed. 2d 855 (1996). The Court held that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id. Specifically, the general provision "that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." Id. Thus, the Court concluded that the Colorado amendment had no rational relationship to a legitimate governmental purpose. Id. at 867-68.

The Marriage Protection Act--which derives from the same animus that motivated Colorado voters to pass the state amendment invalidated by the Supreme Court--is similarly unconstitutional. The sole objective of the Marriage Protection Act is to prohibit federal courts from reviewing the Defense of Marriage Act because some supporters of the Marriage Protection Act believe that the federal courts, including the U.S. Supreme Court, will find DOMA to be unconstitutional. Denying courts the ability to review a law for its constitutionality because of a concern that the law might be unconstitutional does not serve any legitimate purpose of government. Moreover, preventing the Supreme Court from exercising its constitutional duty to invalidate a possibly unconstitutional law does not serve any legitimate purpose. In fact, it would serve the wholly illegitimate function of fostering a possible constitutional violation.

The effect of the Marriage Protection Act on gay and lesbian couples seeking access to federal courthouses for possible judicial review of DOMA will be the same as the effect of the Colorado amendment on Colorado cities that passed anti-discrimination laws. Namely, the Marriage Protection Act would violate the principle "central . . . to the idea of law . . . that government and each of its parts [shall] remain open on impartial terms to all who seek its assistance." Id. at 866.

By effectively and purposefully denying gay and lesbian couples the right to even get into a federal courthouse to make their arguments against DOMA, the Marriage Protection Act does not serve any legitimate governmental interest. As the Court held, "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." Dep't of Agric. v. Moreno, 143 U.S. 528, 534 (1973) (cited in Romer, 134 L. Ed. 2d at 867). As such, the Marriage Protection Act is unconstitutional as not "bear[ing] a rational relationship to a legitimate governmental purpose." Romer, 134 L. Ed. 2d at 868. Thus, it will be found unconstitutional upon judicial review.

B. The Marriage Protection Act Would Intrude on the Core Function of the Supreme Court, Potentially Allowing 50 Different Interpretations of DOMA's Constitutionality

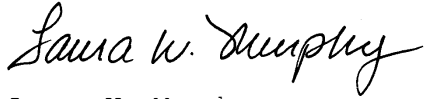
The Marriage Protection Act takes the extraordinarily harmful step of denying even the U.S. Supreme Court of jurisdiction, thereby denying the Supreme Court its historical role as the final authority on resolving differing interpretations of federal statutes. As a result, the Marriage Protection Act would potentially allow as many as 50 different interpretations of DOMA's constitutionality, as each of the 50 state supreme courts would be a final authority on the constitutionality of DOMA.

Although the courts have had few occasions to determine any permissible limits on court-stripping, primarily because the Congress has traditionally exercised restraint in passing court-stripping legislation, it is clear that no statute can deprive the Supreme Court of its essential functions. The explanation provided by James Madison in Federalist Paper No. 80 has been the guiding principle for both Congress in considering court-stripping legislation, and for the courts in considering court-stripping statutes. Federalist Paper No. 80 states that the core functions of the judiciary include ensuring the supremacy and uniformity of federal law, and that congressional action to undermine these functions would be impermissible.

The Marriage Protection Act wholly violates the separation of powers principle explained in Federalist Paper No. 80. Under the Marriage Protection Act, all challenges to the cross-state recognition section of DOMA would be finally determined by the 50 state supreme courts. No gay or lesbian couple will be able to ever appeal to the U.S. Supreme Court and no state will be able either to remove a challenge to DOMA to federal court or to appeal to the U.S. Supreme Court. The Marriage Protection Act would cause the very legal chaos that the U.S. Supreme Court averts by its core function being the final authority on the constitutionality of federal statutes. The Congress cannot deny the Supreme Court this core function.

The ACLU strongly urges you to reject the Marriage Protection Act because of its unconstitutional harm to a group of specific individuals and its harm to the constitutional role of the U.S. Supreme Court in determining with finality the constitutionality of federal laws. Please do not hesitate to call us at 202-675-2308 if you have any questions.

Sincerely,



Laura W. Murphy
Director



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Legislative Counsel